

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 June 2018

Public Authority: Stroud District Council
Address: Ebley Mill
Ebley Wharf
Stroud
GL5 4UB

Decision (including any steps ordered)

1. The complainant requested information relating to the Stroud Subscription Rooms.
2. Stroud District Council (the Council) provided some information within the scope of the request but refused to provide the remainder citing sections 22 (information intended for future publication), 36 (prejudice to effective conduct of public affairs) and 42 (legal professional privilege) of the FOIA.
3. The Commissioner has investigated the Council's application of section 36(2)(b)(i) and (ii) and (c) to the information within the scope of part 7 of the request.
4. The Commissioner's decision is that the Council correctly applied section 36(2)(b)(i) and (ii) of the FOIA to the withheld information.
5. The Commissioner does not require the Council to take any steps as a result of this decision.

Background

6. With respect to the subject matter of the request in this case, the Council told the Commissioner:

"The Subscription Rooms is a Council owned and managed building situated in the centre of the main town in the Council's largely rural

administrative district. The premises are largely hired out for a range of private and public events...

In 2016/17 as part of the Council's need to identify and meet significant budget saving proposals ... the future of the Subscription Rooms was put forward for review by the Council... "

7. It explained that a working group known as the Subscription Rooms Task and Finish Group ("the Group") was set up to investigate options, gather information etc.

Request and response

8. On 7 August 2017, the complainant wrote to Stroud District Council and requested information in the following terms:

"This is a request under the Freedom of Information Act. Please could you provide me with:

1. *The names of the members of the Stroud District Council Task & Finish Group charged with responsibility for the review of the Subscription Rooms.*

2. *Dates and times of the meetings when the Task & Finish Group will meet to consider the bids submitted for the Subscription Rooms.*

3. *Confirmation of whether these meetings will be open to the public.*

4. *Copies of Appendix C, Appendix E and Appendix F mentioned in the minutes of the Strategy and Resources Committee on 26 January 2017: <https://www.stroud.gov.uk/media/241244/i...>*

5. *The written criteria by which Stroud District Council will evaluate bids for the Stroud Subscription Rooms.*

6. *Copies of any documents that contain details of the "issues relating to the title to the land which may affect its attraction to the commercial market", as mentioned in the minutes of 26 January 2017.*

7. *Any other preparatory reports or papers prepared by or for the Task & Finish Group relating to the review of the Subscription Rooms.*

8. *The date when the Task & Finish Group will report to the Strategy & Resources Committee.*

9. Confirmation of whether this meeting will be public".

9. The request was made using the '*whatdotheyknow*' website.
10. The Council responded on 31 August 2017, providing some of the requested information.
11. Following an internal review of its handling of parts 2, 5 and 7 of the request the Council wrote to the complainant on 9 October 2017. It revised its position, variously citing sections 22 (information intended for future publication), 36 (prejudice to effective conduct of public affairs) and 42 (legal professional privilege) of the FOIA.
12. As invited by the Council, the complainant requested a further review of its handling of part 7 of the request. With regard to the notes of meetings that were referred to in the Council's correspondence, she asked the Council:

"... Please could you therefore now publish these "notes of meetings"? If these notes are still exempt for one of the above reasons, please confirm which".

13. The Council sent her the outcome of its further review on 13 December 2017. It clarified that the section 22 exemption related to the draft report which had since been published and confirmed its application of sections 36 and 42 to the remaining withheld information.

Scope of the case

14. The complainant contacted the Commissioner on 14 December 2017 to complain about the way her request for information had been handled. Specifically she disputed the Council's handling of part 7 of her request and its refusal to provide this information by virtue of sections 36 and 42 of the FOIA. In that respect, she told the Commissioner:

"I requested from Stroud District Council all papers prepared by or for the council's Task & Finish Group relating the Group's review of the Subscription Rooms.

This request was refused under sections 36 and 42 of the Freedom of Information Act".

15. During the course of the Commissioner's investigation, the Council confirmed that some of the information referred to in its correspondence with the complainant, namely a draft report, was not held at the time of the request. Accordingly, the Commissioner does not consider that information to be within the scope of her investigation.

16. The analysis below considers the Council's application of section 36 of the FOIA to the withheld information within the scope of part 7 of the request. That information comprises notes of meetings of the Group that were held at the time the request was received (7 August 2017). The Council provided the Commissioner with a copy of the withheld information during the course of her investigation.

Reasons for decision

Section 36 prejudice to effective conduct of public affairs

17. Sections 36(2)(b)(i) and (ii) and section 36(2)(c) of the FOIA state that:

"2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act – "

(b) would, or would be likely to inhibit-

(i) the free and frank provision of advice, or

(ii) the free and frank exchange of views for the purposes of deliberation, or

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs".

18. In this case, the Commissioner must first:

- ascertain who the qualified person is,
- establish that they gave an opinion,
- ascertain when the opinion was given, and
- consider whether the opinion was reasonable.

19. In its submission to the Commissioner, the Council confirmed that the Monitoring Officer provided the opinion. The Commissioner is satisfied that the Monitoring Officer is the qualified person for the purposes of section 36.

20. In correspondence with the Commissioner, the Council confirmed that the qualified person reached the opinion:

"... that both S36(2)(b) and (c) applied".

21. Although the Commissioner was not provided with details of any submission provided to the qualified person, nor when the opinion was

given, the qualified person confirmed that she had access to all the requested information and was aware of the process being followed by the Council and the Group as part of the review of the Subscription Rooms.

22. With respect to the qualified person's opinion about whether the prejudice or inhibition would or would be likely to occur, the Council variously cited 'would' and 'would be likely to' in its correspondence.

23. It told the Commissioner:

"... disclosure of the relevant meeting notes would prejudice the review. In particular, ... it would or would be likely to inhibit members of the Group from having full and frank discussions about the review..."

24. It also said that the qualified person formed the view:

"... that future working groups would likely be adversely affected by disclosure of the notes. In particular, the effective conduct of the Council's public affairs in future would be likely to be affected, as members of such groups... would be reluctant to exchange views or give advice... for fear that individual comments made in the course of such discussions would be made public"

25. The Council emphasised the importance of a safe private environment for the Group to share its views, free from fear of intimidation or lobbying from external sources. In doing so, the Council referred to strong public views within the town regarding the future of the Subscription Rooms.

Is the exemption engaged?

26. When considering whether section 36 is engaged, the Commissioner must determine whether the qualified person's opinion is a reasonable one. The Commissioner will consider the relevant factors including:

- whether the prejudice relates to the specific subsections of section 36(2) that are being claimed. If the prejudice or inhibition is not related to the specific subsections, the opinion is unlikely to be reasonable;
- the nature of the information and the timing of the request, for example, whether the request concerns an important ongoing issue on which there needs to be a free and frank exchange of views or provision of advice;
- the qualified person's knowledge of, or involvement in, the issue.

27. When determining whether the opinion is a reasonable one, the Commissioner considers that if the opinion is in accordance with reason and not irrational or absurd – that is if it is an opinion that a reasonable person could hold – then it is reasonable.
28. With respect to the nature of the prejudice, the Commissioner's guidance on section 36 states¹:

"Information may be exempt under section 36(2)(b)(i) or (ii) if its disclosure would, or would be likely to inhibit the ability of public authority staff and others to express themselves openly, honestly and completely, or to explore extreme options, when providing advice or giving their views as part of the process of deliberation. The rationale for this is that inhibiting the provision of advice or the exchange of views may impair the quality of decision making by the public authority".

29. Her guidance also recognises that:

"... if section 36(2)(c) is used in conjunction with any another exemption, the prejudice envisaged must be different to that covered by the other exemption. Furthermore, the fact that section 36(2)(c) uses the phrase "otherwise prejudice" means that it relates to prejudice not covered by section 36(2)(a) or (b). This means that information may be exempt under both 36(2)(b) and (c) but the prejudice claimed under (c) must be different to that claimed under (b)".

30. The Commissioner has also been guided by the Tribunal's indication in the case of *Guardian Newspapers Ltd and Brooke v Information Commissioner & BBC* (EA/2006/0011 and EA/2006/0013, 8 January 2007)², that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur and thus 'does not necessarily imply any particular view as to the *severity* or *extent* of such inhibition [or prejudice] or the *frequency* with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant' (paragraph 91). Therefore, when assessing the reasonableness of an

¹ https://ico.org.uk/media/for-organisations/documents/1175/section_36_prejudice_to_effective_conduct_of_public_affairs.pdf

²

<http://informationrights.decisions.tribunals.gov.uk//DBFiles/Decision/i81/Guardian%20Brooke.pdf>

opinion the Commissioner is restricted to focussing on the likelihood of that inhibition or harm occurring, rather than making an assessment as to the severity, extent and frequency of prejudice or inhibition of any disclosure.

31. In this case, the Council argued that it needed a 'safe space' to share views and obtain advice before options were finalised and recommendations made for formal and public debate.

32. In correspondence with the complainant, it told her:

"... that the withholding of relevant information is appropriate in this case to ensure that the Council's review of the future of the Subscriptions Rooms is not prejudiced by virtue of individual officers and Members of the Group being unable to have full and frank discussions about the review. It is important that the Group reaches an informed and well thought through recommendation which such discussions will facilitate."

33. In correspondence with the Commissioner the Council argued the need for the Group:

"... to be free to continue to express their views in a manner which did not expose individuals to public criticism or lobbying by any one bidder or their supporters particularly when the matter remained unresolved..."

34. The Commissioner recognises that this need for a safe space will be strongest when the issue is still live.

35. In her guidance, the Commissioner states:

"The safe space argument could also apply to section 36(2)(b), if premature public or media involvement would prevent or hinder the free and frank exchange of views or provision of advice. On the other hand, if it is argued that disclosing information would interfere with or distract from the process in any other way, or would prejudice or undermine the decision itself, rather than the frankness of the discussion specifically, then this argument only relates to section 36(2)(c)".

36. In respect of the opinion given by the qualified person and the exemptions contained at section 36(2)(b), the Commissioner would emphasise that these exemptions are about the processes that may be inhibited, rather than what is in the information. The issue is whether disclosure would be likely to inhibit the processes of providing advice or exchanging views.

37. Having considered the matter, and mindful that the issues under discussion were still live at the time of the request, the Commissioner accepts that it was reasonable to argue the need for a safe space on the basis that premature public or media involvement would be likely to prevent or hinder the free and frank exchange of views or provision of advice. Sections 36(2)(b)(i) and (ii) are therefore engaged.
38. For section 36(2)(c) to be engaged, however, some prejudice other than that to the free and frank expression of advice or views has to be shown.
39. While she accepts that it is not an unreasonable position to take that future working groups would be likely to be affected if the disputed information was disclosed, as members of such groups would be reluctant to exchange views or give advice, the Commissioner does not find that the Council has demonstrated some prejudice other than that to the free and frank expression or advice or views.
40. It follows that she does not accept that section 36(2)(c) is also engaged.

The public interest test

41. The exemption is subject to the public interest test set out in section 2(2)(b) of the FOIA. The Commissioner has therefore considered whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld meeting notes.

Public interest arguments in favour of disclosing the requested information

42. The Council recognised the general public interest in openness and transparency. In that respect it explained to the Commissioner that:

"...key information had been made available to the public ..."

Public interest arguments in favour of maintaining the exemption

43. In favour of maintaining the exemption, the Council argued that it was in the public interest that the Group was able to discuss matters freely and frankly without being inhibited by the prospect of their comments becoming public before any decision was made about the future of the Subscription Rooms. It considered that particularly relevant given the timing of the request, emphasising that the matter remained unresolved.
44. It was also the Council's view that disclosure would be likely to have a future impact on its effective conduct. It foresaw, for example, that members of such groups would, in the future, be reluctant to exchange views or give advice.

Balance of the public interest

45. In the Commissioner's view, having accepted the reasonableness of the qualified person's opinion that disclosure of the information would be likely to have the stated detrimental effect, the Commissioner must give weight to that opinion as a valid piece of evidence in her assessment of the balance of the public interest. However, in order to form the balancing judgment required by section 2(2)(b) of the FOIA, the Commissioner is entitled, and will need, to form her own view as to the severity, extent and frequency of that detrimental effect.
46. In forming a view on the balance of the public interest in this case, the Commissioner has taken into account the general public interest in the openness and transparency of the Council as well as a range of public interest factors that apply in relation to the specific information in question:
 - she acknowledges that the information relates to an area of interest to those affected;
 - she accepts that there is public interest in avoiding potential disruption to an ongoing review, in this case one that aimed to explore options for the building in question;
 - she has taken account the timing of the request.
47. The Commissioner accepts that the future of the Subscription Rooms generated strong public feeling in the community.
48. She also accepts that, at the time of the request, the Council was still in the process of discussing and refining options about the future of the Subscription Rooms.
49. In view of the above, the Commissioner finds that disclosing the information would be likely to impact on the ability of the Council to explore all options and discuss the best way forward in order to make sound decisions factoring in all opinions and issues.
50. Her conclusion is that the public interest in avoiding this prejudice is a strong factor and she considers that the public interest in maintaining the exemption outweighs that in disclosure.
51. The Commissioner is satisfied that the Council correctly withheld the information under section 36(2)(b)(i) and (ii) of the FOIA.

Other exemptions

52. As the Commissioner has found that the exemptions at section 36(2)(b)(i) and 36(2)(b)(ii) apply to the withheld information she has not deemed it necessary to consider the application of section 42.

Other matters

53. Although not a requirement of the FOIA, the Commissioner's guidance on section 36 states:

"Public authorities should keep a record of the qualified person's opinion and the submission made to obtain that opinion. In the event of a complaint, the ICO will expect to see a record of the qualified person's opinion".

54. The Commissioner expects the Council to ensure that any future cases it handles, in which it is relying on section 36, adhere to the advice set out in the aforementioned guidance and the separate guidance specifically covering the record of the qualified persons opinion³

³ https://ico.org.uk/media/for-organisations/documents/1176/section_36_record_of_the_qualified_persons_opinion.doc

Right of appeal

55. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

56. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
57. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Deborah Clark
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF